Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BRETT KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether denials of a motion to suppress evidence on double jeopardy claims, and/or a motion to suppress hypnotically induced testimony are final orders within the meaning of 28 U.S.C. § 1291.

2. Whether, on a multiple count indictment, evidence of a crime to which a defendant is found not guilty in one count may be used in a subsequent trial of counts on which the original jury was unable to make a finding.

3. Whether hypnotically induced testimony deprives a defendant of his right to confront his accusers.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Seventh Circuit is unpublished, and is attached hereto as Appendix A.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on November 24, 1981. Associate Justice John Paul Stevens extended the time within which to file a petition for a writ of certiorari to, and including, January 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 28, United States Code § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

February 28, 1979, Petitioner Brett Kimberlin (hereinafter "petitioner") was charged in a 34 count indictment returned by the grand jury for the United States District Court for the Southern District of Indiana. Trial was had to a jury on all 34 counts, and, on October 8, 1980, the jury found petitioner not guilty of count 25, guilty of counts 26 through 34, and were unable to reach a decision as to counts one through 24. The district court declared a mistrial as to counts one through 24 and dismissed the jury.

Count 25 of the indictment, to which the jury found petitioner not guilty, alleged that petitioner had a 1974 felony conviction for perjury, and that in 1978 he had transported two boxes of .223 caliber ammunition from Ohio to Indiana. Counts 26 through 34, to which the jury found petitioner guilty, alleged that petitioner had illegal possession of patches and insignia of a type prescribed for use by the federal government.

May 18, 1981, petitioner was back before the district court for trial on counts one through 24 of the indictment. Prior to jury selection, the district court ordered that counts 23 and 24 be severed for trial purposes from counts one through 22. This was due to: (a) the remoteness in time between the offenses charged in counts 23 and 24 from the remaining counts; and, (b) the likelihood of prejudicial impact on the jury because petitioner's alleged 1974 conviction for perjury was a material and included element of the offenses charged in counts 23 and 24. Counts 23 and 24 alleged that petitioner, being a convicted felon, had illegally come into possession of explosives.

Following a second trial, petitioner was found guilty on counts 23 and 24 of the indictment, on June 3, 1981.

Prior to his third trial, on counts one through 22, petitioner filed a motion to suppress evidence to be offered at that trial on the grounds that certain evidence to be introduced would violate the double jeopardy clause of the United States Constitution. The motion was filed and denied on August 24, 1981. On the same date petitioner filed his notice of appeal.

Prior to trial petitioner also filed a motion to suppress evidence to be offered at his third trial on the grounds that the testimony of certain witnesses had been gained through the use of hypnotism and that this would deny him the right to confront his accusers. The motion was denied and a notice of appeal was filed.

Appeals of the denial of both motions were taken to the United States Court of Appeals for the Seventh Circuit. November 24, 1981, the court of appeals dismissed the appeals concluding that the orders appealed from were not final orders thus the court of appeals lacked jurisdiction to hear the appeals.

REASONS FOR GRANTING THE PETITION

The reasons for this Court to grant the petition will be divided into three parts: (1) the jurisdictional question of whether the denial of the motions were final orders and were appealable to the Seventh Circuit Court of Appeals and to this Court, (2) whether the denial of the motion to exclude evidence was in violation of the double jeopardy clause of the United States Constitution, (3) whether the denial of the motion to suppress hypnotically induced testimony was in violation of the right to confront witnesses clause of the United States Constitution. There is a conflict among the various Circuit Courts and for that reason this Court should grant the Writ of Certiorari.

I.

WHETHER DENIALS OF A MOTION TO SUPPRESS EVIDENCE BASED ON DOUBLE JEOPARDY CLAIMS, AND A MOTION TO SUPPRESS HYPNOTICALLY INDUCED TESTIMONY ARE FINAL ORDERS WITHIN THE MEANING OF 28 U.S.C. § 1291.

In *Abney v. United States*, 431 U.S. 651 (1977) this Court granted certiorari to determine whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291, and thus immediately appealable.

In holding that such pretrial orders rejecting claims of former jeopardy were final decisions for purposes of § 1291, this Court recognized that § 1291 did not uniformly limit appellate jurisdiction to those final judgments which terminate an action. Although a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality

traditionally considered indispensable to appellate review such orders fall within the "small class of cases" placed beyond the confines of the final judgment rule by the holding in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The *Cohen* case was a derivative action brought in federal diversity jurisdiction. The defendants demanded that plaintiffs post a $125,000 bond, invoking a New Jersey statute that made derivative action plaintiffs holding small amounts of stock liable for the expenses and attorney's fees incurred by successful defendants, and required security for payment. The district court ruled that the statute was not applicable in a diversity action. The court of appeals reversed, and was affirmed by this Court. Before addressing the merits of the question, this Court ruled that the order denying the request for security was a final decision, appealable under § 1291, even though the case itself was far from ultimate disposition.

First, the matter to be reviewed must have been finally disposed of by the district court, so that its decision is not tentative, informal or incomplete. This Court's further statement that appeal gives a power of review, not intervention, underscores the purpose of this requirement. So long as there is a plain prospect that the trial court may itself alter the challenged ruling, there is little justification for immediate appellate intrusion. The bare fact that the court has power to change its ruling, however, does not preclude review. It is enough that no further consideration is contemplated.

Second, the matter to be reviewed must be "separable from, and collateral to, rights asserted in the action." This requirement was voiced in other ways as well, but apparently the various phrases refer to the same basic criterion. Thus the matter raised by the appeal must not

be a step toward final judgment, in which it would "merge"; it must not "affect, or * * * be affected by, decision on the merits"; and it must be so "independent of the cause itself" that appellate decision need not await disposition of other matters. The purposes of this requirement relate closely to the basic purposes of the final judgment rule itself. In fact, it helps protect against repetitive consideration of the same matters by the court of appeals—so long as the matter is so collateral that it need not entail consideration of the merits, it may be reviewed immediately with no greater cost in appellate time than if review were postponed. In addition, this requirement helps improve the quality of appellate review—if the matter is one whose decision is affected by decision on the merits, review before trial of the merits might reach a result that would not be accepted on later appeal. Finally, this requirement may minimize the intrusion on continuing trial court proceedings, since it may often prove possible for trial preparation and even trial to continue pending appeal of the separable question.

Third, there must be a risk of important loss if present review is not available. In *Cohen*, this Court noted that the right to security for expenses of defense would not be merged in final judgment, and could be lost, probably irreparably, if the defendants should win after trial on the merits. The asserted right was found too important to be denied review.

Finally, the court stated that not every question affecting security would be appealable, and noted that the instant case involved a serious and unsettled question.

The *Abney* court was in no doubt that pretrial orders rejecting claims of former jeopardy met the *Cohen* test. In the first place there can be no doubt that such orders

constitute a complete, formal and, in the trial court, a final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee. Hence, *Cohen*'s threshold requirement of a fully consummated decision is satisfied.

Moreover, the very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's pending criminal trial, i.e., whether or not the accused is guilty of the offense charged.

Finally, the rights conferred on a criminal accused by the double jeopardy clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the government suggests. However, this Court has long recognized that the double jeopardy clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.

In conclusion the court held that pretrial orders rejecting claims of former jeopardy, such as that presently before you, constitute "final decisions" and thus satisfy the jurisdictional prerequisites of § 1291. Just such an order is on review here.

In the District Court when oral argument was held pertaining to the motion to exclude evidence, the government argued that the question did not present a double jeopardy question but the evidence was admissible under the Federal Rules of Evidence, 404(b).

The merits of this argument is discussed in the second part of the reasons for granting this writ. Likewise the merits of excluding hypnotically induced testimony will be discussed in the third part of the reasons for the granting of this writ. However, if this court agrees the decisions of the District Court were final then this court has jurisdiction to hear this appeal.

II.

WHETHER, ON A MULTIPLE COUNT INDICTMENT, EVIDENCE OF A CRIME TO WHICH A DEFENDANT IS FOUND NOT GUILTY IN ONE COUNT MAY BE USED IN A SUBSEQUENT TRIAL OF COUNTS ON WHICH THE ORIGINAL JURY WAS UNABLE TO MAKE A FINDING.

The motion to exclude evidence was filed and denied on August 24, 1981, the notice of appeal was filed the same day. The motion to exclude evidence raised double jeopardy issues in regards to the admission of evidence as to counts 23 and 34 of the original 34 count indictment which evidence had been adduced at prior trials.

Kimberlin was acquitted on October 8, 1980, of count 25 which stated as follows:

> The Grand Jury Further Charges That:
>
> On or about September 21, 1978, in the Southern District of Indiana, Brett C. Kimberlin, having been convicted of perjury, a crime punishable by imprisonment for a term exceeding one year, On January 18, 1974, in the Southern District of Indiana, knowingly did transport ammunition, that is, two boxes of .223 caliber Remington ammunition, in interstate commerce, from the Southern District of Ohio, into the Southern District of Indiana, in violation of Title 18, United States Code, Section 922(G)(1)

The motion to exclude evidence argued that principles of double jeopardy, *Res Judicata*, and collateral estoppel rendered inadmissible all evidence previously adduced as to the alleged interstate transportation of ammunition on September 21, 1978. The motion included any and all evidence pertaining to the vehicle in which the ammunition was found and to the contents of that vehicle because the acquittal must have been premised on an implicit finding that petitioner was not the owner or possessor of the vehicle on September 21, 1978.

Kimberlin was convicted of counts 26-34 on October 8, 1980. These counts are not set out in full but involve possession of patches and insignia of a type prescribed for use by the federal government. The motion to exclude evidence argued that having been once forced to defend against those counts, and respond to the evidence adduced as to those counts, and having been convicted, petitioner Kimberlin would be subjected to multiple punishment by the double jeopardy clause if forced to respond to the identical evidence in a subsequent trial on different charges.

Counts 23 and 24 are not set out in full but charged that petitioner Kimberlin received explosives which receipt was made illegal by the fact that he had a prior felony conviction. The first trial of these counts resulted in a hung jury on October 8, 1980. These counts were severed for the purpose of the second trial which resulted in a conviction of counts 23 and 24 on June 3, 1981. Petitioner Kimberlin had been forced to defend against these charges and the evidence adduced pursuant thereto on two separate occasions and after a severance. Petitioner's motion to exclude evidence argued that to force petitioner to defend against that evidence a third time after an earlier severance violated principles of double jeopardy.

The doctrine that evidence of other crimes can be admitted in a criminal proceeding is well received by all courts. There is, however, a split in decisions pertaining to the issue herein. That is whether evidence of a crime which the petitioner had been found guilty of is admissible at a subsequent trial.

Several states have held the evidence inadmissible. In *People v. Ulrich* (1963) 30 Ill. 2d 94, 195 N.E. 2d 180, where the Supreme Court of Illinois held that evidence of an alleged offense by defendant on a 6-year old girl who had accompanied an 8-year was prejudicial and inadmissible, where the offense on either girl was not committed within view of the other and where defendant had previously been acquitted of the offense on the 6-year old. In *State v. Kerwin* (1975) Vt., 340 A. 2d 45, the Supreme Court of Vermont held that where the charge arose out of defendant's allegedly shooting at hunters on his property, admission of evidence that defendant later held hunter at gunpoint, of which charge defendant had previously been acquitted, was prejudicial error. In *People v. Carbell* (1977) Mich., 259 N.W. 2d 193, the Court of Appeals of Michigan held that admission of evidence tending to show defendant's prior similar criminal acts was prejudicial error. In *Stuart v. State* (1978) Texas, 561 S.W. 2d 181, the Court of Criminal Appeals, *en banc* held that reversible error was committed by the admission of evidence concerning a prior occurrence involving an alleged rape of which defendant had been previously acquitted.

Various federal courts have held that when a defendant has been acquitted the evidence of the acquitted crime may not be used in subsequent trials. In *United States v. Gurney*, 418 F. Supp. 1265 (M.D. Fla. 1976), Chief Judge Young held that evidence could not be introduced at trial for the purpose of relitigating issues which had previously been determined by the acquittal

of defendant as to five counts of the seven-count indictment, said issues more specifically being an alleged transaction wherein defendant was supposed to receive a free condominium in Florida; whether defendant told his then law partners that the law firm could not take clients doing business with the United States Government; and whether defendant instructed one named individual in a telephone conversation not to give an FHA project to another named individual.

Chief Judge Kaufman in *United States v. Mespoulede*, 597 F. 2d 329 (2nd Cir. 1979) held that where defendant was charged in a two-count indictment with conspiracy to distribute cocaine and with possessing approximately 1.2 kilograms of cocaine with an intent to distribute, and jury acquitted defendant on possession count, but failed to reach a verdict on conspiracy count, so that trial court declared a mistrial on that charge, element of collateral estoppel contained in double jeopardy clause operated to preclude government from introducing evidence in subsequent prosecution on conspiracy count that defendant had possessed cocaine involved in subject transaction inasmuch as first jury had necessarily resolved question in defendant's favor when it acquitted him of possession.

Circuit Judge Mackinnon wrote in *United States v. Day*, 591 F. 2d 861 (D.C. 1978), evidence of one defendant's participation in prior crimes was inadmissible under the doctrine of collateral estoppel where the defendant had been acquitted of those charges. District of Columbia Circuit Court of Appeals also held in *Green v. United States*, 138 U.S. App. D.C. 184, 426 F. 2d 661 (1970) that admission against defendants of evidence that had been the subject of a count of which defendants had been acquitted in a previous trial was inadmissible in the second trial under the doctrine of collateral estoppel. In *Green*, the first trial for various offenses relating to a robbery ended in

a mistrial when the jury could not reach a verdict. However thereafter, the trial judge directed a verdict of acquittal on one of the counts, unauthorized use of a vehicle in violation of D.C. Code § 22-2204. At a second trial, defendants were convicted of robbery and assault over appellant's objection that they had been acquitted of the count concerning unauthorized use of a vehicle. A witness was permitted to testify at the second trial that on the evening before the robbery, he and the appellants stole the car which was the subject of the count and that they used the same car in the robbery. The Seventh Circuit Court of Appeals in *United States v. Castro*, 629 F. 2d 456 (1980), Circuit Judge Swygert, held that doctrine of collateral estoppel operated to foreclose government from introducing evidence in second trial concerning defendant's membership in a conspiracy to distribute illegal drugs where combinations of persons in first and second alleged conspiracies were encompassed by same agreement and facts essential to conspiracy conviction in second trial were determined favorably by jury in its verdict of acquittal on conspiracy count in first trial.

The doctrine of collateral estoppel, as applied in criminal cases, precludes the relitigation of a question of fact distinctly put in issue in the former proceeding and not merely collaterally in question. *People v. Cornier* (1964) 42 Misc. 2d 963, 249 NYS 2d 521.

Kimberlin relies on this Court's decision in *Ashe v. Swenson*, 397 U.S. 436 (1970), where this court defined collateral estoppel as being an awkward phrase, but stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit, although first developed in civil litigation, collateral

estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*, 242 U.S. 85 (1916).

In cases wherein a previous judgment is reflected in a general verdict the court examining a collateral estoppel claim must review the record of the prior proceeding to determine whether a rational trier of fact could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

An examination of the record of the trial held before Judge Noland will reveal that the only rational basis for the jury's verdict of acquittal as to count 25 was that the petitioner did not transport or possess the ammunition described therein in the blue over white Chevrolet on September 21, 1978. Implicit in that finding is that the defendant did not own or possess the Chevrolet or its content. That issue was hotly contested at the prior trial, and the jury elected to believe the defense. *Ashe* therefore clearly prohibits the re-litigation of ownership or possession of the Chevrolet containing the ammunition; and evidence attempting to link petitioner Kimberlin to the Chevrolet or its contents must thus be excluded.

Testimonial or other evidence pertaining to counts 26 through 34, and original counts 23 and 24, must be excluded for the reason that the admission of said evidence would subject the accused to multiple punishment for the same offenses, in violation of the double jeopardy clause, and due to the fact that the government will be seeking to utilize evidence used to obtain convictions in the first two trials in order to attempt to obtain convictions at this third trial.

The question as to whether evidence used to obtain convictions on counts 26 through 34 and counts 23 and

24 can be used to obtain convictions in the instant trial is somewhat different from the question as to whether the government can now use evidence which was previously used at the trial wherein petitioner Kimberlin was acquitted on count 25. Petitioner again relies upon the collateral estoppel doctrine enunciated in *Ashe v. Swenson, supra,* even though in *Ashe* the prosecution used the same evidence which resulted in a prior acquittal to obtain a conviction, while petitioner Kimberlin seeks to exclude evidence used in prior proceedings which resulted in convictions. In its broadest sense, collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and reliable judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe, supra.* Although not re-charged now with counts 23 and 24 and counts 26 through 34, Kimberlin is once again placed in the position of having to defend against the allegations in those counts. This is the precise situation which the double jeopardy clause was created to prevent, for the constitutional guarantee against jeopardy protects not only against a second prosecution after a prior acquittal; but it also prohibits a second prosecution after a conviction. *In re Nielson,* 131 U.S. 176 (1889), and multiple punishments for the same offense, *Ex parte Lang,* 18 Wall. 163. If the evidence sought to be excluded by petitioner is admitted at trial, and he is subsequently convicted and sentenced, he will suffer multiple punishment for the offenses alleged in original counts 23 and 24, and 26 through 34. Therefore, the evidence must be excluded.

At the hearing on August 24, 1981 in front of the Honorable William E. Steckler, the government argued that there was no double jeopardy or collateral estoppel issue. Rather it was evidence which was admissible under Rule 404(B) of the Federal Rules of Evidence. The basis

for the government's argument at that time was simply that under Rule 404(B) other crimes or acts could be used if it was being used for the purpose of showing, intent, opportunity, preparation, plan, scheme or design, knowledge, identity and motive. (page 11 of hearing transcript). Kimberlin believes we are dealing with a lot more serious issues, that is, may the government after presenting their evidence to one jury who finds the defendant not guilty turn around and use that same evidence in another trial to help convict the defendant for another crime.

During the argument the government contended that they wanted to use the evidence to show a "series of facts and conduct which are so blended or connected with the one on trial as that proof of one incidentally involves the other, and explains the circumstances thereof, and tends logically to prove necessary essential elements of the crimes charged. Now your honor, there has been on acquittal on counts 1 through 22. Collateral estoppel or double jeopardy can only apply—No. 1, collateral estoppel can only apply if there is acquittal. There has been no acquittal." (Hearing transcript p. 12) Kimberlin believes that the government is wrong in that assessment. *Ashe, supra.* Goes beyond acquittals, Kimberlin contends that double jeopardy and collateral estoppel goes to the evidence used in a prior trial which the defendant was found guilty, that is putting into evidence at the second trial evidence which Kimberlin has already been asked to defend against. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The government conceded that the evidence

would be prejudicial but the value outweighed the prejudicial effect it would have.

Although all state jurisdictions agree that no evidence may be introduced which seeks solely to prove that the accused has a criminal disposition, the question of when evidence of a particular criminal as may be admitted is so perplexing that the cases sometimes seem as numerous "as the sands of the sea."

The prohibition against other crimes evidence takes two forms in the United States. Subdivision (B) of Rule 404 follows previous federal practice in adopting a so-called "inclusionary" rule which admits all evidence of other crimes relevant to an issue in a trial, except that which tends to prove only criminal disposition. *United States v. Papadakis*, 510 F. 2d 287 (2nd Cir. 1975), *cert. denied*, 21 U.S. 950. Under the "exclusionary" rule prevailing in the majority of other jurisdictions, all other crimes evidence is excluded unless it is relevant to specified facts and propositions, such as identity, motive, common scheme or plan, and knowledge.

Kimberlin should not be held to defend a second time against evidence related to a crime, count 25, that he had been found not guilty of; also, he should not be held to defend against the evidence a second time where the jury had already determined, counts 23 and 24 and counts 26 through 34, that he was guilty. The prejudicial effect would outweigh the relevance of the evidence.

III.

WHETHER HYPNOTICALLY INDUCED TESTIMONY DEPRIVES A DEFENDANT OF HIS RIGHT TO CONFRONT HIS ACCUSERS.

Allowing Kimberlin to be placed in jeopardy, trial, after the testimony of the witnesses had been hypnotically

induced is denying Kimberlin his right to confront witnesses and a fair impartial trial. Kimberlin filed a motion to suppress which was denied and this interlocutory appeal followed.

The general test for determining the admissibility of a new scientific technique was enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) as follows:

> Just when a scientific principle of discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye has been followed in the majority of jurisdictions. See *Hughes v. Mathews*, 576 F. 2d 1250 (7th Cir. 1978).

Hypnotically induced memory enhancement is so unreliable that it has not gained general acceptance in the scientific community as a technique for accurate recall. Thus, evidence derived from this technique is, *ab initio*, inadmissible.

To determine the admissibility and the reliability of this method, hypnotic enhancement (and possible alteration) of memory, it is necessary to understand the uses and possible abuses of hypnosis. Before scientific evidence can be admitted, it must be reliable and it must have achieved general acceptance in the scientific community. It should further be noted that the acceptance must be for the purpose for which the scientific method is being used. The problem is that the primary purpose for which hypnosis is accepted is use in therapy

and other medical uses, but there is no general scientific acceptance of hypnosis as a mechanism for accurately determining truth. See Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 Ohio St. L.J. 1, 14 (1946). Thus, the therapeutic use of hypnosis must be distinguished from its use in the courtroom. To put this issue in perspective it is helpful to paraphrase an example from a speech given by a recognized expert in the field: If an adult patient complains of incest during childhood, it matters little whether the complaint is in reality a fantasy or a report of historic events. However, turning the same statement over to a police detective could result in a prosecution. This matters a great deal to the possible defendant. *See generally* Orne, *Hypnotism, Suggestibility and the Law*, 31 Neb. L. Rev. 575 (1952).

Hypnosis, by its very nature, is a process of suggestion. The classic works on the subject, by their titles indicate that suggestion and hypnosis are synonymous. *See, e.g.*, Hull, *Hypnosis and Suggestibility, An Experimental Approach*, (1968), and Weitzenhoffer, *Hypnotism, An Objective Study In Suggestibility* (1953). It is not surprising, therefore, that the subject of hypnosis often comes to think, either voluntarily or through suggestion by the hypnotist, that false statements are true.

If a subject is suggestible, several dangers spring to mind. Perhaps the most chilling is the possibility that the hypnotist can suggest the "memories" he or she wishes to elicit. Less malicious, but more likely is the possibility that the hypnotist may subconsciously coerce the subject by "cues" to give desired responses, or simply ask leading questions. *See* Orne, *The Nature of Hypnosis: Artifact and Essence", Jour. of Abnormal and Social Psychiatry*, Vol. 58, No. 3 (1959) at pp. 277, 283 and 296-7.

The physical surroundings or the presence of other people in the room in which hypnosis is being performed may influence the result. Additionally, the subject may have a desire to conform, to please the hypnotist, or to achieve symmetry in testimony. *See* Woocher, *Did Your Eyes Deceive You?* 29 Stan. L. Rev. 969 (1978). These dangers are exacerbated when, as in the case at bar, a police officer aware of the information sought conducts the hypnosis. Special Agent Donovan of Alcohol, Tobacco and Firearms was present at Carr's and Jones' hypnosis and testified that he communicated questions to Detective Appleby, the hypnotist. These questions were not preserved; therefore, the suggestibility of these questions cannot be ascertained. The variances in the hypnosis subjects identification and recall lead to the presumption that these questions were unduly suggestive. In the absence of safeguards, the inherent unreliability of hypnotic memory enhancement because of suggestibility, has been succinctly summarized as follows:

> The hypnotized subject's impulsion to produce expected responses, which even incorporates his own subjective conviction, may also be described as the subject's impulsion to validate what he believes the hypnotist expects. Moreover, this tendency to validate the shared expectations is quite independent of the contents of these beliefs . . .
>
> No investigator is such a paragon of scientific objectivity that he completely escapes blinding emotional commitment to his favorite hypothesis. Even the most brilliant and cautious of men have a sizeable talent for intellectual self-delusion. When, however, as in the investigation of hypnosis, this penchant to self-delusion is harnessed to the hypnotized subject's validating tendency, it is extremely difficult—unless the most rigorous experimental controls are applied—for *any* investigator to avoid being drawn into the vortex of pseudology.

Shor, *"The Fundamental Problem in Hypnosis Research as Viewed from Istorical Perspective,"* In HYPNOSIS: RESEARCH DEVELOPMENTS AND PERSPECTIVES at 38-39. (Fromm and Shor, eds. 1972). (Emphasis in original). Thus, the post-hypnotic statements must be excluded.

There is extensive evidence in the literature that hypnosis may make subjects more confident in their recall without making them any more accurate. *Eg.*, Hilgard & Ernest, HYPNOTIC SUGGESTIBILITY (1965). On the basis of both extensive research on and experimentation with the phenomenon of age regression. Professor Orne states that hypnosis facilitates the appearance of two distinct tendencies in subjects: (1) a modest increase in memory recall; and (2) a proclivity to confabulate (i.e., to fill in those historical aspects that the individual cannot remember in an effort to comply with the hypnotists suggestions.) *See* Orne, *Hypnotized Witnesses May Remember Too Much*, 64 A.B.A.J. 187 (Feb., 1978). These tendencies illustrate that material produced during hypnotic revivification, or immediately thereafter, might not necessarily be historically accurate. Unless this material is subject to independent verification, there is no way for the subject, or even a psychologist or psychiatrist with extensive experience in the field, to distinguish between an actual memory and a confabulation. This problem is compounded especially since the subject may have an absolute conviction about his recall of a certain event, regardless of whether it was an actual memory or a mere confabulation. *See* Margolin & Arguimbau, *Update on Hypnosis in Criminal Law*, (Practicing Law Institute, 1978) at p. 837, 838-839.

Not only does such evidence have the usual hearsay problems, but the use of such testimony violates the Sixth Amendment to the U.S. Constitution, which provides that the accused shall enjoy the right of confrontation; and basic to the right of confrontation is the right

of cross-examination. The hypnotic process which creates new "memories" may well be irreversible; the original memory cannot be questioned. In these instances, the tampering with human memory by suggestion, leading questions, or confabulation may lead to a firm conviction in falsehood that cannot be shaken.

Absent a validation procedure such as confirmation of the reliability of the procedure as viewed by the scientific community, under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), testimony of a prosecution identification witness who has undergone hypnosis on the subject of his testimony must be viewed as inadmissible as in violation of the defendants rights of confrontation and cross-examination. *See Pointer v. Texas*, 380 U.S. 400 (1965).

Hypnotically induced eyewitness identification evidence must be excluded because it also violates defendant's right to due process. In *Simmons v. United States*, 390 U.S. 377, 384 (1968), cited with approval in *Manson v. Brathwaite*, 432 U.S 98 (1977), evidence will be excluded where the pretrial identification procedure is "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification."

The key phrase in the *Simmons* standard is "irreparable mis-identification." The Court has recognized in all the cases that the true danger of suggestive pretrial identification procedures is that an initial misidentification may not be rectifiable through the ordinary device of cross-examination. The essential defect of hypnosis is that if there is misidentification, it is inevitably irreparable. The original memory is altered forever.

Martin Orne, President of International Society of Hypnosis, quoted in *Human Behavior* Magazine, April, 1978, stated: "unfortunately, a witness who is uncertain about his (or her) recall of a particular set of events can,

with hypnosis, be helped to have absolute subjective conviction about what had happened—though the certainty can as easily relate to a confabulation as to an actual memory . . ." Ernest Hilgard, Director of Stanford University's Laboratory of Hypnosis Research, in the same article said "it is well-known that hypnotists may implant memories, so that the hypnotized person accepts them as his (or her) own."

Authorities agree that hypnosis is not a useful tool for ensuring the accuracy of a subject's recall. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L.Rev. 313 (1980); Spiegel, *Hypnosis and Evidence: Help or Hindrance?* 347 *Annals N.Y. Acad. Sci.* 73, 79 (1979). The authorities state that while hypnosis often can produce remarkably accurate recall, it is also prone to yield sheer fantasy, willful lies, or a mixture of fact with gaps filled in by fantasy.

Several features of the hypnotic experience explain why hypnosis, unless carefully controlled, is not generally accepted as a reliable means of obtaining accurate recall. First, a person undergoing hypnosis is extremely vulnerable to suggestions. In describing the events he is reliving, he will tend to shape his "recall" in response to intentional or inadvertent cues from the questioner. These cues may be as obvious as leading questions or as subtle as the inflection of the questioner's voice or degree of apparent approval by the hypnotist. Diamond, *supra*, at 333; Orne, *supra*, at 318, 326. In addition, a subject often will incorporate into his response his notion of what is expected of him. Authorities note that there are particular problems of suggestibility when the subject is aware of a preferred response or when the examiner has a preconceived theory that is likely to influence his questioning. *Id.* at 322 because of the unpredictability of what will influence a subject, it is difficult

even for an expert examining a videotape of a hypnotic session to identify possible cues. Diamond, *supra*, at 339.

A second aspect of hypnosis that contributes to its unreliability is the loss of critical judgment. A person under hypnosis is more willing to speculate and will respond to questions with a confidence he would not have as a waking person. Orne, *supra*, at 319.

The third and perhaps most troubling phenomenon is the tendency to confuse memories evoked under hypnosis with prior recall. See Diamond, *supra*, at 333-34, 335-36; Orne, *supra*, at 320. As a matter of course, a subject is told that he will remember what he has recalled under hypnosis after he wakes from the trance. In response to this post-hypnotic suggestion, most subjects will indiscriminately mix their hypnotic recall together with their waking memory. Many experts believe that the subject is then unable to evaluate critically the resulting memory to determine what he himself believes is the accurate version. See Diamond, *supra*, at 335-36; Orne, *supra*, at 318-320. Furthermore, he will have strong subjective confidence in the validity of his new recall, which will make it difficult for an expert or a jury to judge the credibility of his memory. Diamond, *supra*, at 339-40; Orne, *supra*, at 320; Spector & Foster, *supra*, at 593.

Kimberlin is placed in a position of cross-examining witnesses whom actually believe what they are saying since the testimony is hypnotically induced. It would be impossible for defense counsel to shake the testimony, if false, since the witness does not believe it to be false. In light of that, Kimberlin is being denied his right to confront his accusers. Hypnosis, by its very nature, is a process of suggestion. By their titles, the classic works on the subject indicate that suggestion and hypnosis are synonymous. It is not surprising, therefore, that the sub-

ject under hypnosis often comes to think, either voluntarily or through suggestion by the hypnotist, that false statements are true. *Trial*, October, 1981, *Hypnosis- Enhanced Testimony: Valid Evidence or Prosecutor's Tool?*

The Minnesota Supreme Court said in *State v. Mack*, 292 N.W. 2d 764: "in addition to its historical unreliability, a 'memory' produced under hypnosis becomes hardened in the subject's mind. A witness who was unclear about his 'story' before the hypnotic session becomes convinced of the absolute truth of the account he made while under hypnosis. This conviction is so firm that the ordinary 'indicia of reliability' are completely erased, and hypnotic subjects have been able to pass lie detector tests while attesting to the truth of statements they made under hypnosis which researchers know to be utterly false. It would be impossible to cross-examine such a witness in any meaningful way." *id.* at 769.

The sixth amendment provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . To be confronted with the witnesses against him." The confrontation clause is made applicable to state criminal prosecutions through the fourteenth amendment.

Basic to the right of confrontation is the right of cross-examination. *Pointer v. Texas*, 380 U.S. 400 (1965). As the court said in *Pointer*, "there are few subjects, perhaps upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. *Id.* at 405.

Moreover, this court recently reaffirmed that *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) sought to preserve the right of confrontation from undue pretrial manipulation of

witnesses. *Moore v. Illinois*, 434 U.S. 220 (1977) (See particularly this court's reference to the danger that a witness who has once made an identification will be predisposed to adhere to this identification in subsequent testimony at trial, and the suggestion that one function of counsel at a lineup could be to cross-examine the (witness) to test (her or his) identification before it hardened.) Note 5, 434 U.S. at 230.

The danger perceived in *Wade* and *Moore* was that a pretrial procedure might so solidify a witness' views as to prevent effective cross-examination, thereby depriving the defendant of the sixth amendment right to confront accusers, in other areas, too, the confrontation clause is read to prevent reliance upon testimony which is solidified by pretrial suggestions. For instance, in *California v. Green*, 399 U.S. 149 (1970), this court considered the applicability of the confrontation clause to the admissibility of prior inconsistent statements and noted: "the main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' false testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth."

There is no practice in which false testimony is more "apt to harden and become unyielding to the blows of truth" than hypnosis. Absent a validation procedure testimony of a prosecution identification witness who has undergone hypnosis on the subject of his or her testimony must be viewed as inadmissible as in violation of the defendant's rights of confrontation and cross-examination.

Hypnotized witnesses may be so inculcated with false information as to affect their response to polygraph

tests, and the widespread recognition that hypnosis "can bolster a witness whose credibility would easily have been destroyed by cross-examination, force the conclusion that hypnosis, by its nature destroys the ability to cross-examine a witness effectively.

The district court denied the motion to suppress thus making a final decision and there was no inclination that he would change his mind (Kimberlin had had one trial which ended in a hung jury where the district court allowed the testimony of witnesses who had been hypnotically induced). This was certainly a collateral matter thus appropriate for interlocutory procedural appeal.

CONCLUSION

The petition for a writ of certiorari should be granted to review the district court's ruling or reverse the seventh circuit court of appeals and order that court to review the district court. This court should not allow district courts in criminal cases to make final decisions and force criminal defendants to trial and deny them fundamental constitutional rights.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 23, 1981

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 81-2396 and 81-2397

vs.

BRETT C. KIMBERLIN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 79-Cr-7—William E. Steckler, *Judge.*

This matter comes before the court for its consideration upon the following documents:

1. The "CONSOLIDATED MOTION TO DISMISS APPEAL NO. 81-2396 AND APPEAL NO. 81-2397" filed herein on October 28, 1981, by counsel for the plaintiff-appellee.

2. The "APPELLANT'S RESPONSE TO MOTION TO DISMISS" filed herein on November 10, 1981, by counsel for the defendant-appellant.

On consideration thereof,

IT IS ORDERED that the motion to dismiss these appeals is hereby GRANTED and these appeals from a decision of the United States District Court for the Southern District of Indiana are hereby DISMISSED.

Both of these appeals are from interlocutory orders and do not represent final appealable orders as required by Title 28, United States Code, Section 1291 nor do they come within the "collateral order doctrine" as set out in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Because the orders appealed from are not final orders this court lacks jurisdiction to hear these appeals. Petitioner may seek review of these issues on direct appeal of his criminal case.